Nos. 96-843 & 96-847

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,

v.

FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

AT&T FAMILY FEDERAL CREDIT UNION
and CREDIT UNION NATIONAL ASSOCIATION,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE FOR THE CONSUMER FEDERATION OF AMERICA IN SUPPORT OF THE PETITIONERS

STEVEN R. BISKER*
Attorney at Law
616 S. Washington Street
Alexandria, VA 22314
(703) 739-0292

* Counsel of Record

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Nos. 96-843 & 96-847

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,

v.

FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

AT&T FAMILY FEDERAL CREDIT UNION
and CREDIT UNION NATIONAL ASSOCIATION,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE FOR THE CONSUMER FEDERATION OF AMERICA IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Consumer Federation of America ("CFA"), a non-profit association of approximately 240 local, state, and national consumer groups, is the Nation's largest consumer advocacy group, representing

more than 50 million Americans.[1] CFA was founded in 1968 to advance the consumer interest through advocacy and education, and to represent the viewpoints and interests of consumers before Congress, regulatory agencies, and the courts. CFA gathers facts, analyzes issues, and disseminates information to the public, Congress and federal agencies to provide a voice for the concerns of consumers, particularly those of limited means who are least able to speak for themselves. CFA represents American consumers on a variety of issues that significantly affect their daily lives, such as financial services, product safety, health care and victim's rights. CFA has often appeared before this Court, either as an *amicus* or as a party, to advance the interests of consumers in cases affecting those interests.[2]

CFA and the consumers it represents have a strong interest in this case. It is the official policy of CFA to support the continued existence of a strong, independent, consumer owned and controlled credit union system. CFA opposes any legislative or regulatory efforts that would hinder credit unions' provision of financial services, particularly to moderate and low income Americans. CFA believes that the lower court's decisions in this case, if allowed to stand, will have devastating consequences for the entire credit union

---

[1] This brief is being filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

[2] Cases before this Court in which CFA has participated include *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, No. 95-922; *Smiley* v. *Citibank (South Dakota), N.A.*, No. 95-860; *Medtronic, Inc.* v. *Lohr*, Nos. 95-754 and 95-886; *United States of America* v. *The Chesapeake and Potomac Telephone Company of Virginia*, Nos. 94-1893 and 94-1900; *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, No. 93-44; *TXO Production Corp.* v. *Alliance Resources Corp.*, No. 92-479; *Arcadia, Ohio* v. *Ohio Power Company*, No. 89-1283 and *Browning-Ferris Industries of Vermont* v. *Kelco Disposal, Inc.*, No. 88-556.

system and for the millions of consumers—many of whom are of low or moderate income—who rely on the services of credit unions to meet their financial needs.

SUMMARY OF ARGUMENT

This Court should grant certiorari to review the court of appeals' erroneous invalidation of the National Credit Union Administration's longstanding interpretation of the common bond provision of 12 U.S.C. § 1759. By improperly substituting its own judgment on this matter for that of the expert agency, the court of appeals reached a decision that threatens to deprive millions of low and moderate income consumers of access to needed financial services. Under the agency's interpretation, federal credit unions have been able to achieve financial stability by diversifying their memberships to include multiple employer groups, each with its own common bond. This has enabled credit unions to serve millions of new members and to do so with fees and rates that are much more favorable than those offered by banks. Under the court of appeals' ruling, however, the federal credit union system would literally be dismembered, and many low and moderate income individuals would be deprived of access to financial services entirely or be forced to rely on fringe banking services. And millions of others would pay substantially higher charges for such services and earn substantially lower rates of interest. Such a devastating ruling to consumers warrants this Court's review.

In addition, CFA urges the Court to resolve the conflict in the circuits over whether banks have standing to enforce the common bond provision. Both the legislative history and the court of appeals' decision itself make clear that this provision was enacted to benefit consumer interests. Yet the court of appeals permitted the respondent banks—whose competitive interests in debilitating credit unions are diametrically

opposed to the consumer interests that Congress intended to protect—to prosecute a case that, if successful, would harm credit union customers throughout the Nation. The Fourth Circuit, when presented with the identical issue, ruled that competitor banks do not have standing to enforce this consumer protection legislation. Only this Court can resolve that conflict.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW IN LIGHT OF THE IMPORTANCE OF THIS CASE TO THE ENTIRE CREDIT UNION SYSTEM AND THE MILLIONS OF CONSUMERS WHO RELY ON IT

CFA urges the Court to grant certiorari to review the D.C. Circuit's invalidation of a fourteen-year-old regulation of the National Credit Union Administration ("NCUA")[3] that allowed credit unions to ensure their financial stability by expanding membership to include multiple employee groups, provided that the individuals comprising each group share a "common bond."

CFA believes that the court below erred both in ruling that competitors of credit unions have standing to challenge NCUA's purported misapplication of the "common bond" provision of the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1759, as well as in failing to defer to NCUA's reasonable interpretation of that provision. But CFA also wishes to apprise the Court of the significance of this case for the millions of consumers—particularly those of moderate or low income—who rely on credit unions. Because credit unions are owned and controlled by their individual members, they

[3] *See* Interpretive Ruling and Policy Statement ("IRPS") 82-1, 47 Fed. Reg. 16,775 (1982); IRPS 82-3, 47 Fed. Reg. 26,808 (1982); IRPS 89-1, 54 Fed. Reg. 31,168 (1989); IRPS 94-1, 59 Fed. Reg. 29,066 (1994), *as amended by* IRPS 96-1, 61 Fed. Reg. 11,721 (1996); *see also* 12 C.F.R. § 701.1 (1996).

are able to provide financial services on far more attractive terms than banks will offer, and to provide those services to some consumers that banks have shunned. The FCUA, as it has been interpreted by NCUA for the last fourteen years, has thus resulted in an enormous financial benefit to consumers—precisely the result envisioned by Congress when it enacted the statute. By contrast, the decision below, if allowed to stand, would entirely deprive some consumers of needed services, would cause consumers prevented from joining credit unions to incur substantially higher fees and charges assessed by banks, and would result in higher fees assessed against all bank customers.

CFA agrees with NCUA and with intervenor/petitioners AT&T Family Federal Credit Union and Credit Union National Association ("CUNA") that NCUA's policy was a reasonable interpretation of the common bond provision, which provides in pertinent part that "[f]ederal credit union membership shall be limited to groups having a common bond of occupation or association * * *." 12 U.S.C. § 1759. The court of appeals held that this provision was unambiguous and therefore that NCUA's interpretation was entitled to no deference whatsoever under the standards set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Yet NCUA's interpretation—that membership in a federal credit union may consist of multiple groups, each of which possesses its own common bond—is certainly a reasonable interpretation of ambiguous statutory language.

Indeed, the court of appeals' own interpretation of the text and purpose of the statute demonstrates its ambiguity. According to the court, the purpose of the common bond provision was to ensure that each credit union would be "a cohesive association in which the members are known by the officers and each other * * *." NCUA Pet. App. at 11a. Yet under the court's interpretation,

employees of two companies could become members of the same credit union where one company has bought another company, which remains a separate subsidiary. *Id.* at 8a. Even if the employees of the two companies are separate and apart from each other and even if they are located at opposite ends of the country, the joint ownership, in the court of appeals' view, satisfies the common bond provision. But such a tenuous union hardly promotes "a cohesive association in which the members are known by the officers and each other." Under NCUA's interpretation, by contrast, the statutory purpose is satisfied so long as the members of each separate group within a credit union share a common bond. This flaw in the court's reasoning further shows that Congress' intent is not clearly discernible and therefore that the statute is ambiguous.

Accordingly, the court of appeals erred in failing to defer to NCUA's interpretation and in substituting its own policy judgments for those of the expert agency entrusted to make such judgments. Given the importance of this issue for consumers throughout the Nation, this Court should not allow the court of appeals' ruling to stand without further review. Credit unions are of vital importance to millions of people who rely on them to provide the entire range of individual financial services.[4] Many low income consumers are precluded from using banking services due to the high minimum balances, high fees, and stringent credit requirements imposed by banks. Credit unions, by contrast, offer much lower fees and more attractive credit terms than do banks.

[4] Much of the information summarized below is set forth in the affidavit of Stephen Brobeck, CFA's Executive Director, filed in opposition to the plaintiffs' motion for injunctive relief in a related case, *First National Bank & Trust Co.* v. *National Credit Union Administration*, Nos. 96-5347 *et al.* (D.D.C. filed Oct. 7, 1996). Respondents filed that action after the court of appeals' decision in the present case, in an attempt to impose the decision in this case retroactively on a nationwide basis.

A recent study conducted by CFA and CUNA shows the degree to which consumers benefit from access to credit union services.[5] That study found the following:

- only a small minority of credit unions, but a large majority of banks, charge fees on economy checking accounts
- fees charged by credit unions for regular checking accounts are, on average, 40% lower than those charged by banks
- on interest-bearing checking accounts, fewer than half of credit unions, but all banks, charge monthly fees when minimum balances are not met, and credit union fees are, on average, 40% lower than bank fees
- significantly fewer credit unions than banks (69% versus 93%) charge for overdrafts, and credit union charges are, on average, 40% lower than bank charges
- significantly fewer credit unions than banks (25% versus 48%) charge an annual credit card fee, and credit union fees are, on average, more than 25% lower than bank fees

These fees are no small matter, particularly to consumers of modest means: total bank fees on deposit accounts exceed $16 billion annually. *See* Federal Deposit Insurance Corporation, *Statistics of Banking* at B-45 (1995).

[5] The data on bank fees was collected by Sheshunoff Information Services by sending a survey to all banks and savings and loans in the summer of 1995. The data on credit union fees was collected through a survey undertaken by CUNA in the fall of 1995 and based on a random sample of 2000 credit unions.

Similar disparities exist between interest rates charged and dividends and interest paid by credit unions and banks. A study undertaken by CFA and CUNA for the period from December 1993 to April 1996 found that credit unions pay significantly higher rates on savings accounts than do banks, averaging about a full percentage point higher for money market and interest-bearing checking accounts, and about two-thirds of a point for certificates of deposit.[6] Likewise, credit unions charge significantly lower rates for credit cards (by 5 percentage points), personal loans (by 1.5 to 2 points), and automobile loans (by 1 to 1.5 points). This study estimated that if all savers were able to shift their savings from banks to credit unions, they would earn about $8 billion more in dividends, and if all borrowers were able to shift their credit card balances from banks to credit unions they would save an additional $8 billion in interest.

As can be seen, credit unions provide enormous benefits for consumers, particularly those with low incomes who are unable to pay the substantially higher fees and interest rates charged by banks. That is precisely what Congress intended when it enacted the FCUA in the wake of the Great Depression. That statute was enacted to "make available to people of small means credit for provident purposes" and to "bring normal-credit resources on a cooperative basis to the masses of the people whose buying power is now so often dissipated in high-rate interest charges." S. Rep. No. 555, 73d Cong., 2d Sess. 1, 3 (1934). Credit unions were intended as a "happy medium" between banks, which often would not lend small amounts of money to low and moderate income individuals, and "loan sharks," who would do so only at usurious rates. *See* 78 Cong. Rec. 7259, 12,224 (1934).

---

[6] This study was based on data collected by Bank Rate Monitor.

The decision below threatens to curtail substantially the enormous consumer benefits provided by credit unions. At a minimum, it would appear that under the court of appeals' ruling, credit unions would be unable to diversify their membership beyond the groups for which they have already received regulatory approvals, thereby preventing them from serving additional members and from achieving the financial stability resulting from this diversification. And if that ruling is accorded full retroactive effect, as respondents have urged in their new lawsuit (*see supra* n. 4), credit unions would be prohibited from accepting any new members outside of their "core" occupational groups, and might even be required to divest new groups added since NCUA's multiple group policy was adopted in 1982. More than 32 million individuals have joined credit unions under that policy.

These results would be disastrous for low and moderate income consumers. The fee structure adopted by many banks creates a significant barrier to millions of individuals who, if prevented from utilizing credit union services, may be deprived of access to financial services entirely or be forced to rely on check-cashing and other fringe banking services. Similarly, many borrowers are not able to obtain credit from banks because they do not have established credit or require small loans. Credit unions, however, are willing to extend credit to those who do not satisfy every requirement of standard underwriting criteria,[7] and, as noted above, credit unions charge significantly lower interest rates than do banks. Many credit unions also provide credit counseling to their members, and have created products specifically designed for low and moderate income members, such

---

[7] *See* National Credit Union Administration, *Letter to Credit Unions No. 174* (August, 1995) (outlining risk-based lending procedures under which credit unions have been able to "reach out to the underserved").

as low dollar credit cards and small loans to cover such items as utility deposits. Moreover, the evisceration of credit unions that would result from the decision below will also affect consumers who are not credit union members. Credit unions are significant competitors to banks, particularly in certain sectors. For example, credit unions are the Nation's second largest providers of automobile loans, with 22.3% of that market. *See* Callahan & Associates, *1997 Credit Union Directory* at 6 (1996). Thus, if competition from credit unions is substantially curtailed, it is reasonable to assume that bank fees and charges will tend to rise even further as a result.

CFA believes that the benefits provided by credit unions to low and moderate income consumers are the result of the financial stability enabled by NCUA's multiple group policy, and the credit union's cooperative structure, which vests ownership and control with the members themselves.[8] Under the court of appeals' ruling, these benefits would be severely reduced through the literal dismemberment of the federal credit union system. A decision of such wide-ranging importance to consumers plainly warrants this Court's review.

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT IN THE CIRCUITS OVER WHETHER COMPETITORS OF CREDIT UNIONS HAVE STANDING TO ENFORCE A LAW INTENDED TO BENEFIT CONSUMERS

Certiorari is also warranted to review the court of appeals' ruling conferring standing on the respondent

[8] *See* 12 U.S.C. § 1757(6) (credit unions are funded by shares purchased by members); *id.* § 1757(5) (credit unions may make loans only to their own members, other credit unions, or credit union organizations); *id.* § 1760 (members control credit unions, with each member having one vote); *id.* § 1761 (credit unions are managed by boards of directors and supervisory committees consisting of credit union members, almost all of whom are volunteers).

banks to challenge NCUA's purported misinterpretation of the common bond provision. In that decision—which is directly contrary to the decision of the Fourth Circuit in *Branch Bank and Trust Co.* v. *National Credit Union Administration Board*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987)—the D.C. Circuit held that banks fall within the "zone of interests" protected by the common bond provision, even though it is undisputed that the competitive interests of banks are squarely opposed to the consumer interests that Congress intended to protect through the statute.

Congress clearly intended the common bond provision as a pro-consumer measure benefiting credit union members. As the court of appeals itself recognized in this case, Congress intended that the FCUA, by "guaranteeing democratic self-government[,] would infuse the credit union with a spirit of cooperative self-help and ensure that the credit union would remain responsive to its members' needs." NCUA Pet. App. at 2a-3a, 17a. Likewise, Congress "assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default * * *. The common bond was seen as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success." *Id.* at 3a, 21a-22a. *See Branch Bank*, 786 F.2d at 626 ("Consistent with the general goals of the statute, the common bond provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks.").

There is no question that the zone of interests test for standing under the Administrative Procedure Act "is not meant to be especially demanding," *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 399 (1987), but CFA does not believe that this Court's standing doctrine should be

expanded to allow such standing to competitor banks whose interests in disabling credit unions are diametrically opposed to the consumer interests Congress intended to protect.

In *Community First Bank* v. *National Credit Union Administration*, 41 F.3d 1050 (6th Cir. 1994), the Sixth Circuit, following the D.C. Circuit, rejected the Fourth Circuit's view and upheld the standing of banks to challenge NCUA's purported misinterpretation of the common bond provision. The Sixth Circuit, however, did so because it felt that "[r]efusing to allow competitor banks to challenge credit union expansion might preclude any challenge to an excessively risky credit union expansion." *Id.* at 1054. According to that court, credit union members and other credit unions lacked incentives to sue and "consumer protection groups [do not] appear to be adequate substitutes for banks, who have sufficient adverse interests to challenge a questionable credit union expansion." *Id.* CFA, however, believes that credit union members and consumer protection groups like CFA and its constituents can, and will, take appropriate actions when consumer interests are threatened. The fact that no credit union member or consumer group has challenged NCUA's multiple group policy may simply be evidence that that policy serves the consumer interests that Congress intended to promote. The lack of any consumer-based challenge, therefore, should not be the legal predicate for allowing an action, like the present one, brought by competitor banks for the express purpose of severely curtailing the substantial consumer benefits provided by credit unions.

Accordingly, in light of the clear and irreconcilable conflict among the circuits on this issue, CFA urges the Court to grant certiorari to determine whether competitors of credit unions may bring suit to enforce the common bond provision of the FCUA.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petitions, the petitions should be granted and the judgment below reversed.

Respectfully submitted,

STEVEN R. BISKER*
Attorney at Law
616 S. Washington Street
Alexandria, VA 22314
(703) 739-0292

* Counsel of Record

Counsel for Amicus Curiae